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Supreme Court, U.S.
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No.

IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1997

JAMES HUNT BARKER - - - - *Petitioner*

*versus*

MARY JO LEEDS, Et. Al. - - - - *Respondents*

On Petition for Writ of Certiorari to the
Supreme Court of the Commonwealth of Kentucky

## PETITION FOR WRIT OF CERTIORARI

JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, Florida 33480
(561) 659-7978
*Pro Se*

April 10, 1998

WESTERFIELD-BONTE CO., 619 W. KENTUCKY–P.O. BOX 3251, LOUISVILLE, KY.

18 pp

## QUESTIONS PRESENTED FOR REVIEW

Did the Judgment of the Kentucky Supreme Court, denying Petitioner's Motion for an Enlargement of Time in which to File a Motion for Discretionary Review, deny Petition the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Did the Order sought to be appealed from, sanctioning Petitioner for filing supposedly "frivolous" motions in the Kentucky Court of Appeals, deny Petitioner the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

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## PETITION FOR WRIT OF CERTIORARI

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

James Hunt Barker, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Kentucky Supreme Court entered in the above entitled case on October 23, 1997.

## OPINIONS BELOW

The Judgment of the Kentucky Supreme Court (Appendix A) was entered on October 23, 1997. The Judgments of the Kentucky Court of Appeals were entered on March 18, 1997 and June 19, 1997 (Appendix B & C respectively). This action originated in the Kentucky Court of Appeals, therefore, there is no Order from the Fayette Circuit Court.

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257.

## QUESTIONS PRESENTED FOR REVIEW

Did the Judgment of the Kentucky Supreme Court, denying Petitioner's Motion for an Enlargement of Time in which to File a Motion for Discretionary Review, deny Petition the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

Did the Order sought to be appealed from, sanctioning Petitioner for filing supposedly "frivolous" motions in the Kentucky Court of Appeals, deny Petitioner the Due Process of Law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States?

## STATUTE INVOLVED

"No person shall be. . . deprived of life, liberty, or property, without due process of law." Constitution of the United States of America, Amendment V.

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . " Constitution of the United States of America, Amendment XIV.

## STATEMENT OF CASE

This action arises out of a will contest. In 1990, Fayette Circuit Court entered an agreed settlement, over the protests of Petitioner, who stated in open court that he did not consent to the settlement which was being forced upon him by his attorneys.

Petitioner appealed from the Judgment approving this agreed settlement to the Kentucky Court of Appeals; that court affirmed the judgment of the Fayette Circuit Court. Petitioner subsequently moved the Kentucky Court of Appeals to set aside this Judgment, pursuant to CR 60.02, on

the grounds that a judgment by consent is not subject to appeal, since an agreed settlement does not present a "case" or "controversy" within the meaning of the state and federal constitutions.

The court denied the Petitioner's Motion; it also sanctioned the Petitioner more than $9,000.00 for filing a supposedly "frivolous" motion. Petitioner then moved the Kentucky Supreme Court to grant Discretionary Review of this Judgment imposing sanctions. In his Motion, Petitioner alleged that the law concerning the applicability of CR 60.02 to Appellate Courts in Kentucky was unclear, and that he could not reasonably have known, based on existing case law, that such Motion was "frivolous."

Petitioner filed this Motion as a *pro se* litigant. He telephoned the Kentucky Supreme Court clerk, and was instructed that he could file the Motion by depositing it in the United States mail. The clerk did not tell Petitioner that the Motion must be sent via registered United States mail. The Petitioner, accordingly, sent the Motion from his home in Nantucket, Massachusetts to the court via certified, return receipt requested.

The Kentucky Supreme Court never returned the motion to him with a letter explaining that the Motion should have been sent via registered United States mail. Petitioner moved the court to grant him an enlargement of time in which to file his Motion for Discretionary Review. The court denied this Motion by Order entered of record October 23, 1997. *See*, Appendix A.

## REASONS FOR GRANTING WRIT

Kentucky's C.R. 6.02, like Rule 6(b), F.R.C.P., provides that a court may extend the time allowed for the doing of an act, if the movant therefor demonstrates "excusable neglect." This phrase means "a failure to take the proper steps at the proper time, not in consequence of the party's

own carelessness, inattention, or willful disregard for the processes of the court, but in consequence of some unexpected or unavoidable hindrance or accident or reliance on the care and vigilance of his counsel or on promises made by the adverse party." Black's Law Dictionary at 675 (rev. 4th ed. 1968), *citing* 1 Black on Judgments § 3.40.

Excusable neg'ect requires a demonstration of good faith on the part of the party seeking an enlargement, and some reasonable basis for non-compliance within the time specified in the rules. What may constitute excusable neglect cannot be categorically stated. Wright & Miller, Fed. Prac. & Proc.: Civil 2d § 1165. However, a number of courts have held that unfamiliarity with, or a misapprehension of, the rules of court constitutes excusable neglect. *Graham v. Pennsylvania Railroad*, 342 F.2d 914 (D.C. Cir. 1964); *Ohlinger v. United States*, 135 F.Supp. 40 (D. Idaho 1955); *Brust v. Industrial Bank of Commerce*, 18 F.R.D. 90 (S.D.N.Y. 1955); *Alfred Hoffman, Inc. v. Textile Mach. Works*, 27 F. Supp. 431 (E.D. Pa. 1939).

In the instant case, the Petitioner has clearly met his burden of demonstrating excusable neglect. Courts do not hold *pro se* litigants to the same standard of care as is expected of attorneys. Petitioner obviously made a good faith effort to comply with the rules of procedure as he understood them. He should not be deprived of his day in court on the technicality that he mailed the Motion via certified mail rather than registered mail.

It is ironic that the Kentucky Supreme Court actually received the Motion several days earlier than it would have done, had the Petitioner sent the Motion via registered mail. The Petitioner has suffered the loss of his cause of action for a purely technical defect, which did not prejudice the court or the rights of the parties in any way.

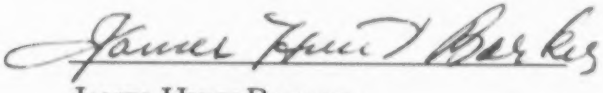
Furthermore, the Petitioner had a meritorious argument which he wished to present to the Kentucky Supreme Court. The Petitioner, a non-lawyer, was sanctioned for failing to realize that a Judgment of the Kentucky Court of Appeals could not be collaterally attacked in that court pursuant to C.R. 60.02. There is nothing in the language of the Rule that precludes its applicability in Appellate Courts. Indeed, the general rule is that the Judgment of any Court may be collaterally attacked for lack of subject-matter jurisdiction, *cf.*, Rule 12(b)(1), F.R.C.P.; *Rath Packing Co.* v. *Becker*, 530 F.2d 1295 (9th Cir. 1975); CR 12.08(3). It is noteworthy that the Kentucky Court of Appeals cited no authority whatever for its holding that its Judgments are not subject to collateral attack.

Petitioner reiterates, he was denied the right to present this meritorious argument to the Kentucky Supreme Court on the basis of a purely technical defect which did not prejudice either the court or the parties in any way. This constituted a clear violation of the Petitioner's Due Process rights.

## CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, FL 33480
*Pro Se*

## CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served, via first-class United States mail, postage pre-paid, upon Mr. Julius Rather, Esq., 156 Market Street, Lexington, Kentucky, 40502; Ms. Diane Carlton, Mr. Charles E. Shival, Esq., and Ms. Susan B. Jones, Stoll, Keenon & Parks, Suite 1000, 201 E. Main Street, Lexington, Kentucky, 40507-1380; Mr. Bruce Lankford, Esq. College of Law, University of Kentucky, Room 2, Administration Bldg., Lexington, Kentucky, 40506; and Mr. Walter May, Esq., Suite 1000, 167 W. Main Street, Lexington, Kentucky, 40507, this 9 day of April, 1998.

James Hunt Barker

JAMES HUNT BARKER
416 Brazilian Avenue
Palm Beach, FL 33480
*Pro Se*